

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PEDRO GARCIA PEREZ,

Defendant-Appellant.

UNPUBLISHED

April 2, 2002

No. 224905

Eaton Circuit Court

LC No. 98-020445-FH

Before: Gage, P.J., and Hoekstra and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his convictions by a jury of (1) possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii); (2) possession with intent to deliver at least fifty but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); (3) possession with intent to deliver less than fifty grams of heroin, MCL 333.7401(2)(a)(iv); (4) conspiracy to deliver marijuana, MCL 750.157a; MCL 333.7401(2)(d)(iii); (5) conspiracy to deliver at least fifty but less than 225 grams of cocaine, MCL 750.157a; MCL 333.7401(2)(a)(iii); and (6) conspiracy to deliver less than fifty grams of heroin, MCL 750.157a; MCL 333.7401(2)(a)(iv). The trial court sentenced defendant to the following terms of imprisonment: (1) 1½ to 4 years for the marijuana delivery conviction, (2) ten to twenty years for the cocaine delivery conviction, (3) five to twenty years for the heroin delivery conviction, (4) 1½ to 4 years for the marijuana conspiracy conviction, (5) ten to twenty years for the cocaine conspiracy conviction, and (6) one to twenty years for the heroin conspiracy conviction. We reverse defendant's conspiracy convictions, affirm the remaining convictions, and remand this case for resentencing.

Defendant first argues that the trial court should have granted his motion for a directed verdict with regard to the conspiracy convictions because the prosecutor failed to prove that the alleged co-conspirator, defendant's passenger in the vehicle containing the drugs, knew that there were controlled substances present or had agreed to participate in any illegal acts.

In analyzing a trial court's denial of a motion for a directed verdict, we consider the evidence presented up to the time the motion was made. *People v Lemmon*, 456 Mich 625, 634; 576 NW2d 129 (1998). "[W]e review the record de novo and consider the evidence presented by the prosecution in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999).

To prove the conspiracy charges, the prosecutor had to show an agreement, express or implied and between two or more persons, to commit an illegal act. MCL 750.157a; *People v Atley*, 392 Mich 298, 310-311; 220 NW2d 465 (1974). “Conspiracy is a specific intent crime, because it requires both the intent to combine with others and the intent to accomplish the illegal objective.” *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001). An unlawful combination and agreement are essential to the crime of conspiracy, but proof of a formal agreement is not required. *Atley, supra* at 311; *People v Boose*, 109 Mich App 455, 468; 311 NW2d 390 (1981). “It is sufficient if the circumstances, acts, and conduct of the parties establish an agreement in fact.” *People v Gay*, 149 Mich App 468, 471; 386 NW2d 556 (1986).

Here, the prosecutor presented no direct proof of an express agreement. Nor did he present evidence from which one could infer an agreement or common enterprise. Indeed, under the circumstances of this case, the mere fact that the alleged co-conspirator presented false identification to the police was insufficient to infer guilty knowledge.

While it is permissible for a prosecutor to prove the existence of a conspiracy by the circumstances, acts, and conduct of the parties, see *id.* at 471, the prosecutor here did not prove that the alleged co-conspirator even knew about the unlawful acts. See generally *id.* Defendant maintained that he was the owner of the vehicle in which the narcotics were located, his fingerprint was found on one of the narcotics wrappings, and no evidence was adduced that the alleged co-conspirator knew of the presence of the drugs, which were not in plain view in the vehicle, or otherwise had knowledge of defendant’s real purpose in traveling to Saginaw. The evidence supported convictions for possession but not for conspiracy.¹ Because insufficient evidence supported defendant’s conspiracy convictions, retrial on those charges is not permitted. *People v Watson*, 245 Mich App 572, 597; 629 NW2d 421 (2001).

Next, defendant next raises allegations of prosecutorial misconduct. First, he argues that the prosecutor’s insistence on an in-chambers conference concerning defendant’s motion for a directed verdict on the conspiracy charges denied defendant his constitutional right to be present throughout every stage of his defense. Because we are reversing defendant’s conspiracy convictions, this issue is essentially moot. At any rate, we note that a criminal defendant has no absolute right to be present for in-chambers discussions, and reversal is only warranted if prejudice is shown. *People v Bergin*, 63 Mich App 526, 528-529; 234 NW2d 687 (1975); *People v Harris*, 133 Mich App 646, 652; 350 NW2d 305 (1984); *People v Pulley*, 411 Mich 523, 531-532; 309 NW2d 170 (1981). Defendant has failed to demonstrate any prejudice inherent from his absence from the in-chambers conference, and appellate relief is therefore not warranted.

Second, defendant argues that the prosecutor’s rebuttal argument and body language were improper and inflammatory and denied defendant a fair trial. We disagree.

¹ Because we are reversing defendant’s conspiracy convictions, we do not address defendant’s additional argument on appeal that the trial court erred in the timing of its decision with regard to the motion for a directed verdict on the conspiracy charges.

We examine a prosecutor's allegedly improper behavior in context to determine whether the defendant received a fair and impartial trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001); *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Challenged remarks must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370, lv den 463 Mich 927 (2000). After reviewing the challenged comments and behavior, we find nothing so improper or inflammatory such that defendant was denied a fair trial.

The conspiracy convictions are reversed and the remaining convictions are affirmed. Because defendant's conspiracy convictions may have impacted his sentences on the remaining convictions, we remand for resentencing. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Joel P. Hoekstra
/s/ Patrick M. Meter